

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DURGA OLI,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 2:15-cv-01637 JRC

ORDER ON DEFENDANT'S
MOTION TO AMEND
JUDGMENT UNDER FED. R.
CIV. P. 59(e)

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter is before the Court on defendant's Motion to Amend Judgment Under Fed. R. Civ. P. 59(e) (*see* Dkt. 21). The matter has been fully briefed (*see* Dkts. 21, 23, 24).

1 After considering and reviewing the record, the Court concludes that this Court's
 2 original opinion and judgment was correct and did not rest on any manifest error of law
 3 or fact. Therefore, defendant's motion to amend the judgment is denied.
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5 **BACKGROUND and PROCEDURAL HISTORY**

6 Plaintiff, DURGA OLI, was born in 1972 and was 31 years old on the alleged date
 7 of disability onset of October 1, 2003 (*see* AR. 249-59). Plaintiff has never attended
 8 school (AR. 47-48) and is illiterate in both her native language (Nepalese) and in English
 9 (AR. 51). Plaintiff and her husband did some subsistence farming in Bhutan (AR. 53).

10 According to the ALJ, plaintiff has at least the severe impairments of "obesity;
 11 deconditioning; [and] arthralgias (20CFR 416.920(c))" (AR. 23).

12 The Court incorporates the procedural history from its previous Order (Dkt. 19).
 13 On April 15, 2016, this Court reversed and remanded the ALJ's decision concluding that
 14 plaintiff was not disabled (*id.*). The Court concluded that the "ALJ's finding that Dr.
 15 Kannon's opinion was based largely on plaintiff's self-report is not based on substantial
 16 evidence in the record" (*id.* at 1-2).

17 On May 13, 2016, defendant filed a motion to amend the judgment pursuant to
 18 Federal Rule of Civil Procedure 59(e) (Dkt. 21). Plaintiff filed a response on May 24,
 19 2016 and plaintiff filed a reply on May 27, 2016 (*see* Dkts. 23, 24).

21 **STANDARD OF REVIEW**

22 According to the Ninth Circuit:

23 Under Federal Rule of Civil Procedure 59(e), a party may move to have
 24 the court amend its judgment within 28 days after entry of judgment.

“Since specific grounds for a motion to amend or alter are not listed in the rule, the District Court enjoys considerable discretion in granting or denying the motion.” *McDonnell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). But amending a judgment after its entry remains “an extraordinary remedy which should be used sparingly.” *Id.* (internal quotation marks omitted). In general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered a previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. *Id.*

Allstate Insurance Co v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing *McDonnell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (citing 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995))).

Defendant contends that this Court's judgment rests on a manifest error of law (*see* Dkt. 21, p. 3).

DISCUSSION

At issue is the ALJ's rejection of the medical opinion of treating physician, Dr. Bodhi Kannon, M.D. and this Court's conclusion that such rejection was not based on substantial evidence in the record as a whole. Included in this Court's decision is the following discussion:

On March 7, 2013, Dr. Kannon noted that plaintiff had been denied disability benefits (AR. 556). Dr. Kannon opined that “[plaintiff] seems to me to be significantly physically and psychologically disabled” (*id.*). The record demonstrates that Dr. Kannon had treated plaintiff on at least sixteen occasions before March 7, 2013 (*see* AR. 455-74, 550-60).

In September, 2012, Dr. Kannon indicated that she was the psychiatrist treating plaintiff and had been doing so “for approximately 2 years” (AR. 519). Dr. Kannon noted that plaintiff had been diagnosed with major depressive illness and was receiving medication management

1 and taking psychiatric medications prescribed by Dr. Kannon (*id.*). Dr.
 2 Kannon opined specifically that plaintiff was unable to work for pay at
 3 that time and furthermore opined that plaintiff “has a difficult time with
 4 daily functioning as it is without the demands of having to go to a job”
 5 (*id.*).

6 The ALJ gave only little weight to this opinion, concluding that
 7 the opinion was “based on [plaintiff’s] subjective complaints, and
 8 [plaintiff] is not very credible” (AR. 25). However, the ALJ does not cite
 9 to any evidence in the record supporting the finding that Dr. Kannon
 10 relied largely on plaintiff’s complaints. As noted previously, Dr. Kannon
 11 indicated that it was her own assessment that plaintiff “seems to me to be
 12 significantly physically and psychologically disabled” (AR. 556).
 13 Defendant contends that “the dearth of objective findings” supports the
 14 ALJ’s finding that Dr. Kannon relied largely on plaintiff’s subjective
 15 complaints when providing her opinions (Dkt. 14, p. 9). However, this
 16 finding by the ALJ appears to be based more on speculation rather than
 17 evidence in the record.

18 Dkt. 19, pp. 4-5).

19 Defendant contends in part that this Court erred because it did not “recognize
 20 [that] the testimony of [non-examining doctor] Dr. Toews alone is a sufficient basis and
 21 explanation for discounting [treating physician] Dr. Kannon’s opinion” (Dkt. 21, p. 4
 22 (citing AR. 25; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001))). However, an
 23 ALJ’s statement that he is giving greater weight to one medical opinion over another
 24 contrary opinion does not entail an adequate explanation as to why one opinion is given
 25 greater weight. The ALJ indicated that he gave greater weight to Dr. Toews’ opinion over
 26 that of Dr. Kannon because of a finding that Dr. Kannon’s opinion is largely based on
 27 plaintiff’s subjective self-reports. Therefore, the question was, as this Court addressed,
 28 whether or not the ALJ’s rejection of the treating physician’s opinion on the basis that it
 29 was largely reliant on plaintiff’s subjective self-report is supported by substantial
 30 evidence in the record as a whole. Although defendant contends in her reply that an ALJ

1 need not go into detail when relying on a source who does, nothing in the case cited by
 2 defendant indicates that an ALJ can fail to credit fully a medical opinion from a treating
 3 physician simply by indicating that he is crediting instead the medical opinion from a
 4 non-examining physician (*see* Dkt. 24, pp. 2-3).

5 Similarly, when an opinion from a treating doctor is contradicted by other medical
 6 opinions, the treating doctor's opinion still can be rejected only "for specific and
 7 legitimate reasons that are supported by substantial evidence in the record." *Lester v.*
 8 *Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035,
 9 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20
 10 C.F.R. §§ 404.1527(a)(2). The Ninth Circuit noted in *Tonapetyan*, the case relied on by
 11 defendant, that the examining doctor's contrary opinion in that case "constitute[d]
 12 substantial evidence, because it rests on his own independent examination of [the
 13 plaintiff]." *Id.* (citations omitted). Dr. Toews did not examine plaintiff (*see, e.g.*, AR. 23).
 14 In general, more weight is given to a treating medical source's opinion than to the
 15 opinions of those who do not treat the claimant. *Lester, supra*, 81 F.3d at 830 (citing
 16 *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). And, an examining physician's
 17 opinion is "entitled to greater weight than the opinion of a nonexamining physician."
 18 *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. §
 19 404.1527(c)(1) ("Generally, we give more weight to the opinion of a source who has
 20 examined you than to the opinion of a source who has not examined you"). Defendant's
 21 argument that the opinion from non-examining doctor, Dr. Toews, alone is sufficient for
 22 the ALJ's rejection of the opinion of plaintiff's treating physician, Dr. Kannon, because
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1 he came to a different conclusion is not persuasive. The ALJ's finding that Dr. Kannon's
2 opinion relied more largely on plaintiff's subjective complaints must be supported by
3 substantial evidence in the record in order to affirm the ALJ's decision.

4 Defendant contends generally that this Court's Order "is inconsistent with
5 substantial evidence review" (Dkt. 21, p. 3). Plaintiff contends that defendant's "'clear
6 error' argument is simply a vehement reiteration of the arguments that this court has
7 previously considered" (Dkt. 23, p. 1). Although defendant contends that this Court
8 committed "clear error because it reweigh[ed] the evidence," the Court disagrees. Instead,
9 the Court noted that the ALJ failed to credit fully the opinion by Dr. Kannon on the basis
10 that it was largely based on plaintiff's subjective self-report, and concluded that this
11 finding by the ALJ was not based on substantial evidence in the record as a whole, with
12 numerous examples of objective findings by Dr. Kannon in the record (Dkt. 19, p. 6).
13 This is not a reweighing of the evidence. Although defendant points to some objective
14 "normal" findings in the record, the fact that there were some occasions on which
15 plaintiff demonstrated some areas of normal presentation does not demonstrate that Dr.
16 Kannon based his opinion largely on plaintiff's subjective complaints. In addition, these
17 findings cited by defendant in the motion to amend the judgment were not provided as
18 rationale by the ALJ in his written decision for the failure to credit fully the opinion from
19 Dr. Kannon. As argued by plaintiff, the "ALJ was responsible for setting out his
20 reasoning but did not cite to this, or any other evidence in rejecting Dr. Kannon's
21 opinion: defendant cannot cure the lack of analysis on appeal" (Dkt. 23, p. 2 (citations
22 omitted)). As noted by plaintiff, "defendant would have the Court cull through the record
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1 to find the evidence in support of the ALJ’s decision, [but] that is not the court’s
 2 function” (*id.* at 3 (*citing Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (“Our
 3 decisions make clear that we may not take a general finding and comb the
 4 administrative record to find specific conflicts”))). Neither the ALJ, nor defendant, point
 5 to any specific evidence within Dr. Kannon’s reports that demonstrates that Dr. Kannon
 6 was relying on plaintiff’s subjective comments. For example, it is not uncommon for a
 7 doctor to render an opinion, such as that a claimant cannot work around people, and
 8 support this opinion with notations of the claimant’s statements, such as that the claimant
 9 reports becoming distressed around crowds, or that the claimant reports easily getting
 10 angry with people. Neither the ALJ, nor defendant, provided any evidence of a self-
 11 reported statement by plaintiff that forms the basis of an opinion by Dr. Kannon.
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13 Furthermore, although defendant claims that the Court erred by reliance on certain
 14 case law, it is the lack of substantial evidence in the record for the ALJ’s finding that
 15 formed the basis of this Court’s conclusion. The Court simply buttressed its rationale by
 16 noting, for example, that “experienced clinicians attend to detail and subtlety in behavior,
 17 such as the affect accompanying thought or ideas, the significance of gesture or
 18 mannerism, and the unspoken message of conversation” and that “appropriate
 19 knowledge, vocabulary and skills can elevate the clinician’s ‘conversation’ to a ‘mental
 20 status examination.’” (Dkt. 19, p. 6 (citing Paula T. Trzepacz and Robert W. Baker, *The
 21 Psychiatric Mental Status Examination 3* (Oxford University Press 1993)). Similarly,
 22 although the court in *Ferrando* was applying a different standard, such does not affect the
 23 rationale in *Ferrando* noted by this Court:
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1 Moreover, mental health professionals frequently rely on the
 2 combination of their observations and the patient's report of symptoms
 3 (as do all doctors); indeed the examining psychologist's report credited
 4 by the ALJ also relies on those methods. To allow an ALJ to discredit a
 5 mental health professional's opinion solely because it is based to a
 significant degree on a patient's 'subjective allegations' is to allow an
 end-run around our rules for evaluating medical opinions for the entire
 category of psychological disorders.

6 (*Id.* at 7 (citing *Ferrando v. Comm'r of SSA*, 449 Fed. Appx. 610, 612 n2 (9th Cir. 2011)
 7 (unpublished memorandum opinion)). The Court did not err by noting these rationales.

8 Defendant also contends that this Court created an insurmountable threshold,
 9 requiring an ALJ to anticipate, identify, and address any statement in any treatment report
 10 that might support an opinion (Dkt. 21, p. 5). To the contrary, however, the Court only
 11 applied the standard required by the Ninth Circuit that all findings be supported by
 12 substantial evidence in the record as a whole (*see* Dkt. 19, pp. 8-9).

13 Defendant contends that the Court erred by finding that objective observations and
 14 opinions by Dr. Kannon were probative as to whether or not plaintiff's impairment was
 15 severe (Dkt. 21, p. 6). And, the Court again concludes that the objective observations and
 16 opinions from a treating physician are relevant as to whether or not a claimant's mental
 17 impairment is severe. There is no manifest error. Similarly, although defendant again
 18 argues the merits of the case regarding whether or not plaintiff suffered from a severe
 19 mental impairment, the Court declines to analyze again its initial determinations on this
 20 point. Dr. Kannon opined that "[plaintiff] seems to me to be significantly physically and
 21 psychologically disabled" and the ALJ did not provide adequate rationale for failing to
 22 credit fully Dr. Kannon's opinions (*see* AR. 556).

1 Finally, although defendant contends that the Court also erred in suggesting that
2 the ALJ failed to fully and fairly develop the record, defendant admits that this Court did
3 not reverse on this ground. Therefore, the Court will not address this argument.

4 **CONCLUSION**

5 Based on the stated reasons and the relevant record, the Court **ORDERS** that
6 defendant's Motion be DENIED.

7 Dated this 10th day of June, 2016.

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11 J. Richard Creatura
12 United States Magistrate Judge
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